Nos. 76-486, 76-512, 76-640,
76-5503 and 76-5603

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTHONY DELUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY SOLDANO, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD BOLELLA, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH MAGNANO AND FRANK PALLATTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 2

Questions presented 2

Statement 3

Argument 6

Conclusion 15

CITATIONS

Cases:

Berger v. *United States*, 295 U.S. 78 7

Blumenthal v. *United States*, 332 U.S. 539 6

Brathwaite v. *Manson*, 527 F. 2d 363, certiorari granted, No. 75-87!, May 3, 1976 10

Cupp v. *Naughten*, 414 U.S. 141 11

Holland v. *United States*, 348 U.S. 121 11

Iannelli v. *United States*, 420 U.S. 770 13

Pinkerton v. *United States*, 328 U.S. 640 8

Townsend v. *Burke*, 334 U.S. 736 13

United States v. *Agurs*, No. 75-491, decided June 24, 1976 9

United States v. *Arroyo*, 494 F. 2d 1316, certeriorari denied, 419 U.S. 827 6

United States v. *Bommarito*, 524 F. 2d 140 13

United States v. *Brown*, 470 F. 2d 285 13

Page

Cases (continued):

United States v. *Cortwright*, 528 F. 3d 168 14

United States v. *Feola*, 420 U.S. 671 13

United States v. *Mallah*, 503 F. 2d 971, certiorari denied, 420 U.S. 995 6

United States v. *Ortega-Alvarez*, 506 F. 2d 455, certiorari denied, 421 U.S. 910 6

United States v. *Sisca*, 503 F. 2d 1337, certiorari denied, 419 U.S. 1008 6

United States v. *Volot*, 481 F. 2d 22 14

Statutes:

Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236 *et seq.*:

21 U.S.C. 841(a) 3

21 U.S.C. 846 ..... 3, 13

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 30 11

Rule 32(c)(3)(A) 12

Rule 32(c)(3)(B) 12

Federal Rules of Evidence, Rule 404(b) 10

H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., pt. 1, (1970 13-14

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-486
ANTHONY DELUTRO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 76-612
ANTHONY SOLDANO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 76-640
FRANK LUCAS, PETITIONER
v.
UNITED STATES OF AMERICA

No. 76-5503
RICHARD BOLELLA, PETITIONER
v.
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 76-486 App.) is reported at 543 F. 2d 431.

JURISDICTION

All petitions were timely filed except No. 76-5603, as to which Mr. Justice Marshall denied an application for an extension of time to file for failure to comply with Rule 34(2) of the Rules of this Court. That petition was filed out of time under Rule 22(1) of this Court's rules on October 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed the existence of a single conspiracy as charged in the indictment (DeLutro, Soldano).

2. Whether the evidence was sufficient to justify submitting to the jury two counts charging petitioner Bolella with distribution of heroin.

3. Whether there was prejudicial error in the inadvertent failure of the prosecutor to disclose three statements of a government witness (Lucas, Bollella, DeLutro).

4. Whether the trial court properly declined to hold a pre-trial hearing to determine whether a particular photographic display was suggestive (Soldano).

5. Whether the trial court properly admitted evidence of prior drug activity in order to show why a particular co-conspirator was immediately admitted into the conspiracy (Pallatta, Magnano, Bolella).

6. Whether the trial court's instructions regarding reasonable doubt constituted reversible error (Bolella, Pallatta, Magnano).

7. Whether the trial court erred in declining to permit petitioners to read their pre-sentence reports, where it chose instead to enumerate those specific factors gleaned from the report that it considered in passing sentence (Bolella, Magnano, Pallatta).

8. Whether the trial court could impose a sentence on petitioner Bolella for conspiracy under 21 U.S.C. 846 that was consecutive to the sentence imposed for the substantive offense.

9. Whether the trial court erred in admitting into evidence a large quantity of cash that was in the possession of petitioner Lucas when he was arrested (DeLutro).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to distribute heroin (21 U.S.C. 846) and of various substantive drug distribution counts (21 U.S.C. 841(a)).[1] Petitioners Magnano and Pallatta were each sentenced to 30 years' imprisonment to be followed by three years' special parole. Petitioner Bolella was sentenced to 20 years' imprisonment and three years' special parole. Petitioner DeLutro was sentenced to 25 years' imprisonment and six years' special parole. Petitioner Soldano was sentenced to 15 years' imprisonment and three years' special parole. Petitioner Lucas was sentenced to 40 years' imprisonment and fined $200,000. The court of appeals affirmed (Pet. 76-486 App.)

The evidence at trial demonstrated a large scale conspiracy to distribute heroin, which operated at least from January 1, 1973, through July 10, 1975, the period charged in the conspiracy count of the indictment.[2] The evidence disclosed that the essential features of the operation involved a core group of three partners (Perna, Verzino

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[1]Petitioners were indicted with 14 other defendants and were tried with one other defendant. The remaining defendants pleaded guilty, were tried separately, or were fugitives at the time of petitioners' trial.

[2]The district court, at sentencing, described petitioners' drug ring as "one of the largest domestic heroin cases in the history of narcotics law enforcement" (sentencing minutes, pp. 51-52).

and Malizia) who purchased large quantities of heroin from petitioners Magnano, Pallatta, Bolella, DeLutro, and Soldano and sold it to petitioner Lucas and others.

The government's two principal witnesses to the scope and operations of the conspiracy were Perna and Verzino. In addition to testifying to numerous transactions during the period of the conspiracy charged in the indictment, Verzino testified that from 1959 to 1966, when he began serving a term of imprisonment, he had engaged in narcotics transactions involving large quantities of heroin with petitioners Magnano, Pallatta, Bolella, and DeLutro (Tr. 1866-1870, 1993-1994). Verzino testified that after he was released from prison in 1973, he met with Perna and Malizia, who said they had been obtaining narcotics from Verzino's "old friends" Magnano, Pallatta, and Bolella and invited Verzino to join their partnership. After Verzino joined it, the partnership purchased additional quantities of heroin from petitioners Magnano and Pallatta jointly, purchased heroin from petitioner Soldano, and, through the efforts of Verzino, purchased heroin from DeLutro (Tr. 1843-1846, 1848-1849, 1863-1871).

On cross-examination, the defendants vigorously tried to impeach the credibility of Perna and Verzino, particularly Perna. Perna's testimony on direct and cross-examination fully disclosed to the jury, *inter alia*, his long career in the narcotics trade, his criminal record, his efforts during their association to have Verzino and his wife killed, his admissions of previous perjury, his admitted willingness to lie against innocent people, his lack of remorse, and his agreements with federal and state authorities concerning his cooperation in this and other cases.[3]

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[3]Tr. 820-823, 960-962, 971-972, 1015, 1030-1032, 1041, 1051-1052, 1085, 1101-1102, 1121-1122, 1147-1148, 1171, 1216-1217, 1298-1299, 1366-1368, 3641-3642.

Perna was arrested in February 1974, escaped from federal detention in September 1974, and was soon recaptured. At trial Perna testified that after his recapture he had agreed to cooperate in full with the government (Tr. 3714). After his recapture, Perna gave three statements to FBI agents, on October 11, October 13, and October 22, 1974 (Pet. 76-640, App. A25-A43). The statements concerned his escape and made no reference to his narcotics activities or any of his narcotics associates. In his October 22 statement, Perna stated that he had lied in his two earlier statements by failing to disclose that his brother, his wife, and his girlfriend had assisted his escape.

These statements were not included in the voluminous materials concerning Perna and Verzino disclosed to the defendants prior to trial. On November 11, 1975, several weeks after the trial, the prosecuting attorney notified the court and defense counsel of the existence of the statements (Pet. 76-640, App. A24) and subsequently submitted an affidavit stating that he had first become aware of the statements on November 8, 1975, and that the statements had been in the possession of another Assistant United States Attorney when the trial commenced (*id.* at A15-A23).

The defendants moved for a new trial on the basis of newly discovered evidence. The motions were denied by the district court, which found that the failure to disclose was inadvertent, that the statements were merely cumulative on the issue of Perna's credibility, and that there was "not a significant chance that the statements could have 'induced a reasonable doubt in the minds of enough jurors to avoid a conviction' " (*id.* at A13).

The court of appeals affirmed the convictions of all petitioners and rejected each of the contentions urged here in a thorough opinion on which we principally rely (Pet. 76-486, App.).

ARGUMENT

The issues presented by the various petitions involve no conflict among the circuits, nor do they present any issue of general importance warranting review by this Court. The issues all concern the application of settled principles to particular facts and were correctly decided by the courts below.

1. Petitioners DeLutro and Soldano argue that the evidence showed multiple conspiracies rather than the single conspiracy charged. More particularly, they allege that because they each made only a single sale to the Perna group, which were separate from each other and from the Pallatta group's sales, each of their sales involved a different conspiracy (Pet. 76-486, pp. 5-10; Pet. 76-612, pp. 17-22). This contention was correctly found to be "singularly unpersuasive" by the court below (Pet. 76-486, App. 4a). To sustain a conspiracy conviction, it is necessary to show an agreement between each defendant and others to achieve a common goal, but it is not necessary to show that each alleged co-conspirator knew all the details and participants of the overall plan. *Blumenthal* v. *United States*, 332 U.S. 539, 556-559.

The common goal of heroin distribution on a massive scale is apparent here. As the court below noted, the quantities that the Perna group were purchasing from each vendor were such that each supplier "must have known there was a horizontal scope to the conspiracy such that others were similarly performing in the supply role" (Pet. 76-486, App. 4a-5a).[5] And as the court below further stated

[5]See also *United States* v. *Ortega-Alvarez*, 506 F. 2d 455 (C.A. 2), certiorari denied, 421 U.S. 910; *United States* v. *Mallah*, 503 F. 2d 971 (C.A. 2), certiorari denied, 420 U.S. 995; *United States* v. *Sisca*, 503 F. 2d 1337 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), certiorari denied, 419 U.S. 827.

(*id.* at 6a): "Each of the 'single acts' here— DeLutro's sale of five kilos of pure heroin and Soldano's sale of three kilos— was to core members of the conspiracy and of such a magnitude as to justify 'an inference that each knew he was involved in a criminal enterprise of substantial scope.'"[6]

2. Petitioner Bolella was convicted of conspiracy (count one) and one count of distribution of heroin in November 1973 (count four). The jury was unable to reach a verdict on two other counts charging Bolella with distribution of heroin in March 1973 (counts two and three). He now

[6]Petitioner DeLutro's suggestion (Pet. 76-486, p. 5) that he could not have anticipated that his product would be in turn sold to others is specious in view of the large quantity of heroin that he supplied to the Perna group.

In any event, even if more than one conspiracy had been shown, the variance would not in the circumstances of this case have constituted reversible error. As the court below noted (Pet. 76-486, App. 6a, n. 2):

> "The material inquiry is not the existence but the prejudicial effect of the variance." *United States* v. *Agueci*, * * * [310 F. 2d 817, 827 (C.A. 2)]. See *United States* v. *Sir Kue Chin*, [534 F. 2d 1032 (C.A. 2) at p. 1035] and cases cited therein. Each of these appellants were actively engaged in the drug world in a large-scale capacity. None were minor participants joined in trial with top echelon personnel such that proof of the guilt of major violators contaminated the jury's consideration of his guilt individually. See *United States* v. *Miley*, [513 F. 2d 1191, 1209 (C.A. 2)]. Nor were the jury's deliberations infected by highly inflammatory testimony about any one of the codefendants which might spill over to the prejudice of others. *Compare United States* v. *Bertolotti*, 529 F. 2d 149, 157-58 (2d Cir. 1975). Essentially the argument of prejudice here is merely a bald assertion that each would have fared better had he been tried alone. As we said in *United States* v. *Borelli*, 435 F. 2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971), an appellant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one * * *." See *United States* v. *Fantuzzi*, 463 F. 2d 683, 687 (2d Cir. 1972).

See also *Berger* v. *United States*, 295 U.S. 78.

contends (Pet. 76-5503, pp. 9-12) that there was insufficient evidence to warrant submission of counts two and three to the jury and that their presence in the case induced the jury to render a compromise verdict.

This contention is belied by the record. There was substantial evidence to show that Bolella was a member of the Pallatta group when it sold two quantities of heroin to the Perna group in March 1973, and that Bolella could thus be charged with the substantive offenses relating to those transactions.[7] *Pinkerton* v. *United States*, 328 U.S. 640. The jury's failure to reach a verdict on those transactions does not indicate a lack of substantial evidence with respect to them or that the guilty verdicts on counts one and four were the product of a compromise.

3. Petitioners Lucas, Bolella, and DeLutro contend that the trial court should have granted a new trial or at least an evidentiary hearing because Perna's three statements, made after his recapture, were not disclosed by the government until after the trial had ended. The court of appeals correctly rejected this contention (Pet. 76-486, App. 12a).

On the basis of the prosecutor's sworn affidavit, the district court found that the failure to disclose was inadvertent. The court also found that the statements were merely cumulative on the issue of Perna's credibility, that Perna's testimony was in any event corroborated, and that there was not a significant likelihood that the disclosure would have changed the verdicts.

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[7] Thus, Verzino testified that he had dealt with Pallatta, Magnano and Bolella as a group even before he went to prison in 1966 (Tr. 1866-1870, 1993-1994). Perna and Verzino also testified that in meetings with co-conspirators, including Bolella, in March 1973 and thereafter, it was stated or understood that Bolella was a member of the Pallatta group (Tr. 540-542, 671-673, 1855, 1907-1908, 1922-1923).

Those findings were amply supported by the record and were not clearly erroneous. The statements related solely to Perna's escape from prison and had nothing to do with his narcotics activities. To the extent they would have been relevant to impeach his credibility as a witness, their contribution to that effort would have been minuscule, in view of the abundance of other evidence demonstrating Perna's general criminality, treachery, viciousness, and willingness to lie in connection with the narcotics activities about which he testified. In those circumstances, the district court did not err in refusing to order a new trial or to order a hearing on the issue of prejudicial effect. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.

4. Petitioner Soldano argues (Pet. 76-612, pp. 12-16) that the trial court erred in failing to hold a pretrial hearing to determine whether a photographic display in which Verzino identified him was impermissibly suggestive. This contention was fully answered by the court below (Pet. 76-486, App. 11a):

> We need not explore the merits of this contention since, even assuming for purposes of decision that a hearing was warranted, no prejudice is cited by the appellant which would support reversal of his conviction.
>
> The pre-trial photographic identification of Soldano by Verzino was not introduced by the Government at trial. Rather, Verzino made an in-court identification of Soldano after testifying to several face to face meetings he and Soldano had prior to consummating a narcotics transaction. [See, *e.g.*, Tr. 828-835, 2004-2045]. This testimony firmly established an independent basis for the in-court identification. On cross-examination Soldano's counsel had full opportunity to explore the circumstances of the

pre-trial identification at which Soldano's picture was one of 32 pictures shown to Verzino. Even on appeal counsel does not seriously argue that the display was impermissibly suggestive or advance any real claim of prejudice suffered therefrom.[8]

5. Petitioners Pallatta, Magnano, and Bolella contend that the trial court erred in admitting evidence of Verzino's drug dealings with them between 1959 and his imprisonment in 1966. This evidence was admitted for the purpose of showing the background and development of the conspiracy (Tr. 722). Specifically, Verzino testified that in 1959 and 1960 he purchased heroin from Magnano and Pallatta; that in 1962 he introduced Pallatta and Bolella to a heroin connection named Ragone and that they trafficked in narcotics with him; and that in 1960 and 1961 Verzino and Magnano were buying heroin from Pallatta and selling it to a specific customer (Tr. 1866-1870).

The court of appeals correctly held that the evidence of petitioners' past relationship with Verzino was not admitted for the impermissible purpose of establishing their criminal character,[9] but for the proper purpose of explaining how

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[8]There is no reason to defer disposition of this case pending decision in *Brathwaite* v. *Manson*, 527 F. 2d 363 (C.A. 2), certiorari granted, No. 75-871, May 3, 1976. In that case the issue is whether the admission of testimony concerning a concededly suggestive pretrial photographic identification is *per se* reversible error whether or not the witness also had an independent basis to make an in-court identification. Here, in contrast, there was no evidence introduced concerning the pretrial photographic identification, and there was clearly an independent basis for the in-court identification. Moreover, as the court below noted, no serious claim is made that the display was impermissibly suggestive or that any real prejudice resulted.

[9]See Rule 404(b), Fed.R.Evid. When the government sought to introduce other evidence that Pallatta and Bolella had sold another lot of heroin in 1973 to a figure unrelated to the main conspiracy, this evidence was rejected by the court (Tr. 2923-2927).

Verzino, upon being released from prison in 1966, was able immediately to enter into a high level drug partnership with petitioners and others. Such evidence was necessary because of its significant bearing on the credibility of Verzino's testimony concerning the conspiracy and his role in it. Moreover, the evidence was directly probative to rebut petitioner Bolella's contention that he was not part of the conspiracy in March 1973.

6. Petitioners Bolella, Pallatta, and Magnano challenge the jury instruction defining reasonable doubt. Their primary objection is that the trial court did not define reasonable doubt as a doubt that would make a person hesitate to act, but rather described it as "such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives."[10]

In the context of the jury instructions read as a whole (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147), the court of appeals correctly concluded that "[r]eading the entire charge it is clearly apparent that the substance of reasonable doubt was fairly conveyed to the jury" (Pet. 76-486, App. 9a).[11] While the Court in *Holland* v. *United States*, 348 U.S. 121, 140, expressed a preference for the formulation now suggested by petitioners, the definition employed here was

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[10]Only counsel for petitioners Pallatta and Magnano objected to the court's reasonable doubt charge, and he objected only to the use of the "willingness to act" rather than the "hesitate to act" formulation (Tr. 4122). Petitioner Bolella is therefore precluded from challenging the charge on appeal, and petitioners Pallatta and Magnano are precluded from challenging the various other portions of the charge which they assail here. Fed.R.Crim.P. 30.

[11]The entire instruction on reasonable doubt is set forth in the opinion of the court of appeals (Pet. 76-486, App. 8a, n. 4).

still held "not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some" (*ibid.*).

7. Petitioners Bolella, Magnano, and Pallatta also contend that under Rule 32(c)(3)(A), Fed.R.Crim.P., the trial court should have allowed them to read their pre-sentence reports. There is no merit to this contention.

Rule 32(c)(3)(A) expressly exempts from any requirement of disclosure "sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." In the instant case, there was ample reason for caution on the part of the court in terms of revealing sources of sentencing information. Prior to trial, co-defendant Gwynn was shot in the back in an unsuccessful attempt on his life,[12] and eight other co-defendants were at large as fugitives.

In the event the court does not disclose a pre-sentence report, Rule 32(c)(3)(B) provides that the court "shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, * * *." In compliance with that requirement, the district court made a thorough summary of the information in the pre-sentence reports, such as prior criminal records and employment background, which the court considered in sentencing. This effectively permitted the defendants to correct any inaccuracies that the court might otherwise have relied upon, and, in fact, counsel for Bolella successfully rectified a possible factual

[12]After sentencing, co-defendant Chapman, as to whom the jury had been unable to reach a verdict, was shot in the back of the head and killed.

inaccuracy with regard to Bolella's employment history (sentencing minutes, pp. 64-66).[13]

8. Petitioner Bolella contends (Pet. 76-5503, pp. 36-41) that he should not have been given a consecutive sentence on the conspiracy charge under 21 U.S.C. 846. In an attempt to avoid the traditional rule that a conspiracy and its substantive object constitute separate offenses,[14] petitioner claims that the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970—of which Section 846 is a part—evinces a legislative intent to impose conspiracy liability only when a defendant fails to consummate a substantive violation. The legislative history cited by petitioner in support of this claim (Pet. 36-40) demonstrates only that Congress intended the maximum punishment for a single substantive count of distribution to be fifteen years; it does not indicate that Congress intended that a conspiracy to commit a substantive offense merges with the completed substantive offense. The same contention as that advanced by petitioner here was rejected by the court of appeals in *United States* v. *Bommarito*, 524 F. 2d 140, 144 (C.A. 2), where the court reviewed the legislative history and concluded that the imposition of separate penalties for the conspiracy offense and the substantive offense was fully consistent "* * * with the Act's overall aim of strengthening remedies available against organized traffic in drugs * * *." See also H.R. Rep. No. 91-1444, 91st

[13]*Townsend* v. *Burke*, 334 U.S. 736, and *United States* v. *Brown*, 470 F. 2d 285 (C.A. 2), cited by petitioners, are inapposite. *Townsend* held that due process was denied when an uncounseled defendant was sentenced on the basis of materially untrue information. In *Brown*, the district court judge involved had declined both to disclose the pre-sentence report and to disclose its substance; the judge in this case carefully explained those facts upon which he relied in passing sentence.

[14]See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 777; *United States* v. *Feola*, 420 U.S. 671, 693.

Cong., 2d Sess., pt. 1, pp. 10-11 (1970); cf. *United States* v. *Cortwright*, 528 F. 2d 168, 176 (C.A. 7); *United States* v. *Volot*, 481 F. 2d 22 (C.A. 2).

9. Petitioner DeLutro argues (Pet. 76-486, p. 11) that it was prejudicial error to admit into evidence some half million dollars in cash that was seized at Lucas' apartment on the day of Lucas' arrest. This objection was fully answered by the court below (Pet. 76-486, App. 10a-11a):

> At the time the cash was seized drug paraphernalia was also found. These items, both the cash and instruments, were admissible evidence relevant to Lucas' participation in the conspiracy. Moreover, Government witnesses testified that Lucas owed the core group several hundred thousand dollars at the time of his arrest. As we said in *United States* v. *Tramunti, supra*, 513 F. 2d at 1105, "[t]he possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." That the evidence is obtained by search conducted after the termination of a conspiracy does not preclude admissibility. *United States* v. *Bermudez, supra*, 526 F. 2d at 95. Moreover, we do not find that the introduction of the physical evidence of the cash was so inflammatory or prejudicial to outweigh its probative value as appellants contend.[15]

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[15]Petitioner DeLutro also makes a general complaint about the trial court's instructions concerning the credibility of government witnesses and of the defendants (Pet. 76-486, p. 11). To the extent his objection is the same as the argument made in the court of appeals, the opinion below properly rejected it (Pet. 76-486, App. 7a, n. 3).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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FEBRUARY 1977.

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